UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte ANDREW LAITT

Appeal 2007-1194
Application 09/980,084
Technology Center 3700

Decided July 13, 2007

Before TONI R. SCHEINER, ERIC GRIMES, and LORA M. GREEN, *Administrative Patent Judges*.

GRIMES, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 involving claims to a food packaging method. The Examiner has rejected the claims as obvious. We have jurisdiction under 35 U.S.C. § 6(b). We affirm.

BACKGROUND

The Specification describes a method of packaging brittle food-stuff comprising:

> forming a tube, forming a first seal at a lower end of the tube, feeding [an] . . . amount of the food-stuff . . . into the tube,

> forming a second seal in the tube . . . , repeating the steps of feeding the food-stuff and sealing along the tube to form a strip of sealed pouches . . . containing the food-stuff and inserting the strip of sealed pouches into a carton, wherein the pouch dimensions are calculated such that each pouch can contain the desired quantity of food-stuff, as well as sufficient air to protect the food-stuff by cushioning.

(Specification 8.) The Specification also states that, at the same time sealing jaws are moving towards the center of the tube to form a seal, "opposed pleat formers . . . move in a transverse direction to the sealing jaws" to "provide tucks in the side of the tube . . . so as to form diametrically-opposed pleats . . .", which results in a "brick-shaped" pouch (*id.* at 4).

DISCUSSION

1. CLAIMS

Claims 1-6, 8-20, 22, 27, and 30-33 are pending and on appeal. The claims have not been argued separately and therefore stand or fall together. 37 C.F.R. § 41.37(c)(1)(vii). We will focus on claim 1, which is representative and reads as follows:

> 1. A method of packaging a brittle food-stuff comprising the steps of forming a tube having a predetermined cross sectional shape and area, forming a first seal at a lower end of the tube, feeding a pre-determined amount of the food-stuff to be packaged into the tube, forming a second seal in the tube at a pre-determined distance above the first seal, repeating the steps of feeding the foodstuff and sealing along the tube to form a strip of sealed pouches of pre-determined dimensions and predetermined volume containing the foodstuff each pouch having at least one long side face which is as long as or longer than all other faces of the pouch in the direction of the strip, and inserting the strip of sealed pouches into a carton, wherein the bulk volume of said predetermined amount of foodstuff fed into each pouch is less than the predetermined volume of each sealed pouch, so that when each pouch is sealed, each pouch contains the desired

> quantity of foodstuff as well as a predetermined amount of air so that if a sealed pouch is placed on said long side face, a layer of air is formed above the foodstuff, wherein at least one pleat is formed on each side of the tube and at each end of each pouch so that each pouch adopts a substantially brick shaped configuration when sealed with the pre-determined amount of air and pre-determined amount of foodstuff therein.

Thus, claim 1 is directed to a method of packaging brittle food-stuff comprising forming a tube, forming a first seal at a lower end of the tube, feeding an amount of the food-stuff into the tube, forming a second seal in the tube, repeating those steps to form a strip of sealed pouches containing the food-stuff, and inserting the strip of sealed pouches into a carton. Each pouch contains food-stuff as well as air such that, if a sealed pouch is placed on its long side face, a layer of air is formed above the food-stuff. In addition, "at least one pleat is formed on each side of the tube and at each end of each pouch so that each pouch adopts a substantially brick shaped configuration when sealed."

2. REFERENCES

The Examiner relies on the following references:

Soubier	US 2,194,451	Mar. 19, 1940
Davy	US 3,199,756	Aug. 10, 1965
Kaufman	US 2,835,596	May. 20, 1958
Niske	EP 0,302,413 A2	Jul. 29, 1988

3. OBVIOUSNESS

Claims 1-6, 8-20, 22, 27, and 30-33 stand rejected under 35 U.S.C. § 103 as obvious over Kaufman in view of Davy or Soubier, and further in

view of Niske.[1] The Examiner relies on Kaufman for disclosing a method similar to that of claim 1, but lacking the steps of producing a "strip of sealed pouches" and adding pleats to produce a "brick shaped configuration" (Answer 4-5).

The Examiner relies on Davy for teaching forming a strip of sealed pouches and inserting the strip into a carton "so that the container serves as a magazine from which the packages may be dispensed one or more at a time for subsequent separation of the packages from the strip for individual delivery" (*id.* at 4), and packaging of brittle material, such as potato chips and popcorn (*id.* at 10). The Examiner relies on Niske for teaching forming a brick shaped container (*id.* at 5).

The Examiner concludes that

> it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the strip of sealed pouches and insert[] the strip into a carton as taught by Davy in the method of packaging food-stuff of Kaufman so that that the container serves as a magazine from which the packages may be dispensed one or more at a time for subsequent separation of the packages from the strip for individual delivery.

(*Id.* at 4-5.) The Examiner also concludes that "it would have been obvious to one having ordinary skill in the art at the time the invention was made to form the brick shaped container . . . for better handling and mechanical strength of containers" (*id.* at 5).

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[1] Since we agree with the Examiner that Davy teaches the limitations for which it and Soubier were cited, we need not discuss Soubier.

We conclude that the Examiner has set forth a prima facie case of obviousness. Kaufman describes a method for packaging marshmallows comprising: (a) providing a tubular section, (b) sealing the tubular section at one end to provide a bag, (c) putting marshmallows in the bag without filling the bag completely, (d) sealing the bag, and (e) placing the bags in shipping cartons (Kaufman, col. 2, ll. 46-55 and ll. 16-19). "During the sealing of the bag, care is taken to incorporate air in the bag, which air is retained after complete sealing of the ends of the bag" (*id.* at col. 2, ll. 56-58). As a result, when "pressure is applied to one face of the bag, . . . as may be the case when the bags are stacked, the marshmallows are distributed away from the point of pressure and an air cushion absorbs and distributes the pressure so that the individual marshmallows are not pressed together" (*id.* at col. 2, ll. 63-69).

Davy describes "an assembly of packages for dispensing products comprising loose particles or pieces of flakey or granular character," such as potato chips or popcorn (Davy, col. 1, ll. 12-16, and col. 2, ll. 32-33). Specifically, Davy describes multiple "packages joined together in a chain and adapted to be readily dispensed by a vending machine," whereby the packages "may be initially packed in a folded arrangement within a container in such manner that the latter may serve as a magazine from which the packages may be dispensed one or more at a time for subsequent separation of the packages from the chain thereof for individual delivery" (*id.* at col. 1, ll. 19-27). The container may be a carton (*id.* at col. 2, ll. 40-41).

Davy states that Figure 4 depicts "the mode of forming, filling and sealing of a chain of packages" (*id.* at col. 2, ll. 11-12). Specifically, Davy states that, as indicated in this figure, a tube is formed, a seal is formed at a lower end, a quantity of foodstuff is added, and a second seal is formed above the first seal, "thereby sealing a previously formed bag and forming the closed end of a succeeding bag" (*id.* at col. 4, ll. 25-35). The sealing and filling process is repeated to form a chain of packages (*id.* at col. 2, ll. 37-40). We agree that the Examiner has provided sufficient basis to combine the methods of Kaufman and Davy in order to form a strip of sealed pouches containing brittle food-stuff and sufficient air "so that if a sealed pouch is placed on [its] long side face, a layer of air is formed above the foodstuff."

Niske describes a method for manufacturing brick-shaped packaging containers by forming of tube from "a preliminarily creased belt-like packaging material web . . . , followed by thermal sealing of lengthwise edge portions, charging the contents, transverse sealing at specific intervals, separation at the sealed portions into individual units . . . , and inwardly folding the upper and lower portions" (Niske, abstract and col. 1, ll. 1-11). Niske applies to "manufacturing brick-shaped containers filled with liquid foodstuff" (*id.* at col. 3, ll. 36-39).

In Niske's method, the filled material tube "is shaped to a rectangular cross section . . . , and is transversely [sealed] at predetermined intervals and cut off for obtaining individual . . . packaging container units" (*id.* at col. 4, l. 54, to col. 5, l. 2). We agree with the Examiner that it would have been obvious to modify the method described by the combined teachings of Kaufman and Davy to form pleats in the tube so that each bag adopts a

substantially brick shaped configuration when sealed, as described in Niske, in order to provide "better handling . . . of [the] containers" (Answer 5).

Appellant argues that "Kaufman does not teach a pouch wherein if the pouch is placed on its long side face, a layer of air is formed above the foodstuff" and that "none of the [other] cited references overcome this deficiency in Kaufman" (Reply Brief 2). In particular, Appellant argues that Kaufman

> states that "when no pressure is applied, the [foodstuff] may be so distributed so that the bag 10 *rests on the product*, as illustrated in Figure 2". . . . Kaufman makes clear that in Figure 2 the bag is resting on the product while in this position. As such, there is not a layer of air formed above the foodstuff. A layer of air is only formed above the foodstuff when pressure is applied to one face of the bag (i.e. the face opposite the one on which is placed on a surface).

(*Id.*)

We are not persuaded by this argument. As noted by Appellant, Kaufman states that "when no pressure is applied the marshmallows *may* be so distributed that the bag **10** rests on the product" (Kaufman, col. 2, ll. 61-63 (emphasis added)). However, Kaufman also states that the bag contains sufficient air that when

> pressure is applied to one face of the bag, . . . the marshmallows are distributed away from the point of pressure and an air cushion absorbs and distributes the pressure so that the individual marshmallows are not pressed together.

(*Id.* at col. 2, ll. 63-69.) Kaufman's Figure 3 shows a cushion of air above the marshmallows. Thus, even though it is possible that, when no pressure is applied, the bag may rest on some of the marshmallows, we agree with the

Examiner that Kaufman teaches a pouch that, when placed on its long side face, contains a layer of air formed above the marshmallows.

Appellant also argues that "one skilled in the art would not combine the teachings of Kaufman and Davy to incorporate the feature of a strip of sealed pouches into Kaufman" (Br. 5). Specifically, Appellant argues:

> Kaufman describes a method for packaging marshmallows that prevents them from deforming and sticking to one another. As marshmallows are not brittle, one of skill in the art would not be motivated to combine Kaufman with Davy, because Davy teaches that the packages must be handled with a level of care not required for packaging of marshmallows.

(Reply Br. 3-4. See also Br. 6-7 (arguing that marshmallows and brittle food-stuffs respond differently to a force applied to their packaging).)

We are not persuaded by this argument. Kaufman and Davy are both directed to methods of packaging foods. Davy describes a method for packaging brittle food-stuff, such as potato chips or popcorn, which forms a strip of sealed pouches that is inserted into a carton (Davy, col. 1, ll. 17-27, and col. 2, ll. 32-41). Kaufman teaches the incorporation of air in the bags in order to protect the contents from being pressed together (Kaufman, col. 2, ll. 56-69).

Appellant's argument that brittle food-stuff "must be handled with a level of care not required for packaging of marshmallows" (Reply Br. 4) only supports our conclusion that one of ordinary skill in the art would have been motivated to incorporate air into the pouches in order to protect the brittle food-stuff being packaged in Davy. Appellant has not provided any evidence that adding air would not also protect brittle food-stuff. "An assertion of what seems to follow from common experience is just attorney

argument and not the kind of factual evidence that is required to rebut a *prima facie* case of obviousness." *In re Geisler*, 116 F.3d 1465, 1470, 43 USPQ2d 1362, 1365 (Fed. Cir. 1997).

> In addition, Appellant argues that neither Kaufman nor Davy teaches a brick shaped configuration. . . . By contrast, in the present invention a brick shaped configuration is formed upon the sealing of the package, due to the inclusion of a pre-determined volume of air with the food-stuff and because of the formation of diametrically opposed pleats during the sealing process.

(Br. 6.)

We are not persuaded by this argument. The Examiner is not relying on Kaufman or Davy to teach packaging material that can retain a brick shaped configuration. Instead, the Examiner is relying on Niske to teach this feature.

Appellant also argues that Niske relates to drink packages, "a completely different area of art. Brittleness is not a concern with drink packaging. One skilled in the art regarding the present invention would not have referred to this reference." (Br. 7. See also Reply Br. 4: "one of skill in the art in the foodstuff packaging industry (where damage to contents is of primary concern) would not look for guidance in a document describing the packaging of liquids (where damage to the container is of primary concern)".)

We are not persuaded by this argument. We recognize that Niske relates to packaging liquids rather than brittle food-stuff. However, we do not agree that this difference renders Niske non-analogous art. "In order to rely on a reference as a basis for rejection of the applicant's invention, the

reference must either be in the field of the applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the inventor was concerned." *In re Oetiker*, 977 F.2d 1443, 1447, 24 USPQ2d 1443, 1445 (Fed. Cir. 1992). In this case, we find that Niske is in the field of Appellant's endeavor, that is, using a tube to form multiple packages of food-stuff.

In addition, Appellant argues that drink containers are made from different materials and have different characteristics than the containers made in the claimed process:

> The present inventor has realized that connecting a series of brick shaped containers gives added lateral stability and furthermore the outer carton provides strength to the entire structure. . . . The inner pouches snugly fitted into the outer carton give it additional support, further resisting deflection of the outer carton to outside pressure/force, which could damage the contents. There is no disclosure of this in either of Soubier or Davy and certainly not in [Niske].

(Br. 7-8.)

We are not persuaded by this argument. First, claim 1 does not specify the rigidity of the packaging material, except to suggest that it has sufficient rigidity to maintain a brick shaped configuration. Second, Appellant has not provided any evidence that the configuration of packages resulting from the method of claim 1 provides an unexpectedly superior result. "[I]t is well settled that unexpected results must be established by factual evidence." *In re Geisler*, 116 F.3d 1465, 1470, 43 USPQ2d 1362, 1365 (Fed. Cir. 1997).

Appellant also argues that "it is not the intention of [Niske] to provide a strip of connected containers. They are separated shortly after being

formed." (Br. 7. See also *id.* at 8: "If one skilled in the art did apply the teaching of [Niske], the result would have been *separate* brick shaped containers made of a rigid material such as cardstock. This is a further teaching away from the present invention.")

We do not find this argument persuasive. We recognize that, in Niske's process, the filled tube is "transversely squeezed, sealed and severed to form individual rectangular container units" (abstract). However, those skilled in the art would have appreciated that Niske's "squeezing and sealing" step is very similar to Davy's sealing step, and additionally provides longitudinal pleats in the resulting packages that give them "rectangular cross section" (Niske, col. 4, l. 55). Likewise, the skilled artisan would have appreciated that providing Davy's packages with a rectangular cross-section would allow them to be more efficiently packed into cartons. Thus, the skilled artisan would have recognized that incorporating Niske's longitudinal pleats would confer an advantage to Davy's process even without the additional cutting step taught by Niske.

Finally, Appellant argues that, "[e]ven if, *arguendo*, one of skill in the art in the foodstuff packaging industry would look to [Niske] for guidance, he or she would not find the teachings necessary to obtain the present invention" (Reply Br. 5). In particular, Appellant argues that Niske

> does not teach that brick shaped containers *per se* are structurally strong. Instead, [Niske] teaches that brick shaped containers with a longitudinal seam near one of the corners of the container are an improvement over previous brick shape containers. One of skill in the art, upon reading [Niske], would not have guidance towards forming the present invention, a brick shaped pouch with pleats at each end of the pouch,

> because the structural components of the two are completely unrelated.

(*Id.*)

We are not persuaded by these arguments. First, Niske teaches the formation of brick shaped pouches, as recited in claim 1. Thus, we do not agree that one of ordinary skill in the art looking at Niske, together with Kaufman and Davy, "would not find the teachings necessary to obtain the present invention" (*id.*). Second, Appellant challenges whether Niske teaches that a brick shaped container would provide better handling and mechanical strength. However, there is no requirement that the motivation to combine references be found in the references themselves. *KSR Int'l v. Teleflex Inc.*, 127 S. Ct. 1727, 1742, 82 USPQ2d 1385, 1397 (2007) ("any need or problem known in the field of endeavor at the time of invention and addressed by the patent can provide a reason for combining the elements in the manner claimed"). Appellant has provided no basis to doubt that one of ordinary skill in the art would have been motivated to form a brick shaped configuration to provide better handling of the containers.

We conclude that the Examiner has set forth a prima facie case that claim 1 would have been obvious in view of the cited references, which Appellant has not rebutted. We therefore affirm the rejection of claim 1 under 35 U.S.C. § 103. Claims 2-6, 8-20, 22, 27, and 30-33 fall with claim 1.

SUMMARY

The Examiner's position is supported by the preponderance of the evidence of record. We therefore affirm the rejection of claims 1-6, 8-20, 22, 27, and 30-33 under 35 U.S.C. § 103.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

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